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RANDALL WULFF

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MANI SUBRAMANIAN, as an individual and citizen of Washington, and as a derivative action plaintiff,

Plaintiff,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota Corporation, and QAD INC., a Delaware Corporation with principal place of business in California, and ARTHUR ANDERSEN LLP, a limited liability partnership headquartered in Chicago, Illinois, and ANDERSEN WORLDWIDE SC, a Societe Cooperative headquartered in Geneva, Switzerland, and JOHN DOORDAN, an individual and citizen of California, and LAIFOON LEE, an individual and Citizen of California, and ROLAND DESILETS, an individual and citizen of New Jersey, and WILLIAM D. CONNELL, an individual an citizen of California, and GREENAN PFEFFER, SALLANDER and LALLY LLP, a limited liability partnership headquartered in California, and RANDALL WULFF, an individual and citizen of California, and DOES 1-50,

Defendants.

Case No. 08-cv-1426-VRW

DEFENDANT RANDALL WULFF'S MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND/OR TO STRIKE COMPLAINT

Date: October 9, 2008
Time: 2:30 p.m.
Dept: Courtroom 6
Judge: Hon. Vaughn R. Walker

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Randall Wulff ("Wulff") hereby moves the Court for an Order dismissing this Action or, in the alternative, granting Summary Judgment in his favor pursuant to Federal Rules of Civil Procedure ("FRCP"), Rules 12(b) and 56, and for an order under FRCP Rule 12(f) striking all of the state law claims against Wulff.

This Motion to Dismiss is brought on the grounds that Plaintiff Mani Subramanian's ("Subramanian") claims against Wulff are barred by (1) *res judicata*, (2) California law providing Wulff with quasi-judicial immunity, (3) the "litigation" privilege of California Civil Code section 47(b), and (4) the *Noerr-Pennington* doctrine. This Motion to Dismiss may also be considered as an alternative motion for summary judgment under Rule 56 of the FRCP on the grounds that there are no genuine issues of material fact that the allegations against Wulff encompass his acts as a court-ordered mediator, or those of his attorneys in prior related litigation, entitling him to absolute protection from civil liability under quasi-judicial immunity. This Motion to Strike is brought under FRCP 12(f) on the grounds that California's Code of Civil Procedure ("CCP") Section 425.16 (the "Anti-SLAPP" procedure) precludes the state law claims based on litigation conduct which is protected speech.

These motions are based on the accompanying Memorandum of Points and Authorities; the supporting Declaration of Andrew Ingersoll; the accompanying Request for Judicial Notice; and such other matters as the Court may receive.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Undeterred by the Ninth Circuit's affirmance of more than $50,000 in sanctions against him in earlier litigation involving the same operative facts alleged here, and the related dismissal of claims against Wulff and others, Subramanian attempts by this Complaint to relitigate issues already finally and correctly decided by this Court.

This lawsuit is the latest chapter in a string of frivolous lawsuits and related pleadings Subramanian has pursued in state and federal courts originally stemming from a dispute between Subramanian and his companies, Vedatech Inc. and Vedatech K.K. (collectively "Vedatech"), on

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the one hand, and QAD, Inc. and QAD Japan, K.K. ("QAD"), on the other. The present lawsuit differs from the earlier federal case involving Wulff only in that the generalized claims of conspiracy and fraud – expanded to encompass claims of constitutional violations and violations of the federal Racketeer Influenced and Corrupt Organization Act, 16 U.S.C. § 1961 *et seq.* ("RICO") – now include allegations that Wulff's attorneys attempted to (for example) "corruptly influence the court" (Complaint at ¶ 165) and "corruptly obtain[] a judgment" (*id.* at ¶ 166), and that St. Paul's, QAD's and Wulff's actions in the prior litigation constituted a "fraud upon the court" (*id.* at ¶ 176). The new Complaint also multiplies the parties alleged to have participated in the conspiracy by more than doubling the number of defendants from the previous suit.

This Court's appropriate admonishment in the previous litigation that Subramanian "recklessly and in bad faith, multiplied the legal proceedings against Wulff by recklessly raising frivolous arguments regarding the inapplicability of [*Howard v. Drapkin*, 222 Cal. App. 3d 843 (1990)]," [1] is even more appropriate now. Under the circumstances, and as *Howard* explicitly recognizes (*id.* at 864), the claims against Wulff should be dismissed before further judicial and party resources are needlessly expended.

Subramanian's claims against Wulff are barred for several reasons: (1) because this Court already addressed and dismissed virtually identical claims in the earlier litigation, *res judicata* precludes their assertion here; (2) even were *res judicata* not applicable, the same controlling case law governing absolute quasi-judicial immunity supporting that earlier decision and its affirmance in the court of appeal commands dismissal here; (3) the litigation privilege in California Civil Code section 47(b), while not relied upon by this Court in its order dismissing the first lawsuit against Wulff, precludes state law claims against Wulff, who acted as a mediator or who, through his attorneys, undertook actions to defend against the first lawsuit; (4) the *Noerr-Pennington* doctrine precludes the claims because they are based exclusively on the protected litigation-related conduct of Wulff and his attorneys; and (5) because the Complaint is based on Wulff's

[1] June 22, 2005 Order in Case 04-1249 ("Dismissal Order") at 33:1820; complete order attached as Exhibit A to Randall Wulff's Request for Judicial Notice in Support of Motions to Dismiss, for Summary Judgment and/or to Strike Complaint, filed herewith ("RJN").

conduct as a mediator in the underlying litigation and on allegations regarding arguments by Wulff's attorneys in defending against the earlier lawsuit, all of the state law claims should be stricken under CCP section 425.16.

II. STATEMENT OF ISSUES TO BE DECIDED

A. Should all claims against Wulff be barred by the doctrine of *res judicata* based on the final adjudication of identical claims asserted by Subramanian in prior litigation involving the same nucleus of operative facts where those claims were dismissed and the dismissal order was upheld on appeal?

B. Should all claims against Wulff based on his acts as a mediator, or the acts of his attorneys in defending him against earlier litigation involving virtually the same allegations, be barred by quasi-judicial immunity under California law, by the privileges afforded by California Civil Code section 47(b), and by the *Noerr-Pennington* doctrine, or alternatively be subject to summary judgment?

C. Should all state law claims against Wulff be stricken pursuant to FRCP Rule 12(f) and CCP section 425.16 because they arise wholly out of protected speech in the litigation context?

III. FACTUAL ALLEGATIONS

Subramanian's claims against Wulff in this suit track the allegations resolved by an earlier lawsuit in this Court (the "Vedatech lawsuit").[2] While Subramanian has added a few allegations redescribing Wulff's actions at the mediation (*see, e.g.*, Complaint at ¶¶ 124-25), the only truly "new" allegations involve positions taken, and arguments made, by Wulff's attorneys in defending against Subramanian's claims in the Vedatech lawsuit (*see, e.g.*, *id.* at ¶¶ 147-149, 151, 154-157, 165-166, 172-174).[3]

[2] The factual allegations and litigation history underlying this lawsuit are largely covered by this Court's order dismissing the claims in the Vedatech lawsuit, which involved three consolidated cases, CV-04-1249, 1818 and 1403. (*See* Dismissal Order, RJN Exh. A, as affirmed by order of the Court of Appeals on July 19, 2007, Appeal No. 05-16255, RJN Exh. B.)

[3] Many of these same allegations were already addressed by the Vedatech plaintiffs in their briefing in that litigation and were resolved by the Court in that litigation.

A. Factual Allegations Regarding The QAD-Vedatech Relationship.

This dispute stems from approximately 1997, when QAD apparently terminated its relationship with Subramanian and Vedatech. (Complaint at ¶¶ 29-31; *see also* First Amended Complaint in the Vedatech lawsuit ("FAC") at ¶ 24, attached with Exhibit A thereto as RJN Exh. C.) Lawsuits and countersuits ensued and ultimately included Vedatech's insurer, Defendant St. Paul. Subramanian alleges that St. Paul frustrated Vedatech's retention of counsel and ultimately stopped paying for counsel to defend them and to prosecute their substantive claims, requiring Subramanian to appear *pro se* since June 2002. (Complaint at ¶¶ 72-100; FAC ¶¶ 30-31.)

B. Allegations Involving Wulff's Participation As A Mediator.

In November 2003, the Vedatech plaintiffs suggested Wulff as a possible mediator to resolve the various complaints and cross-complaints between the parties in the underlying litigation. (FAC at ¶ 32.) At a hearing on January 13, 2004, the Santa Clara County Superior Court ordered the parties to submit their various disputes to mediation before Wulff. (Complaint at ¶¶ 116-18; FAC at ¶ 33.) Plaintiffs "did not object." (FAC at ¶ 37.)

On March 4, 2004, the Superior Court entered a Stipulation and Order Regarding Mediation ("Order"). (Complaint at ¶ 120; FAC at ¶¶ 40 and 46.)[4] The Order required that Subramanian and Vedatech, as well as Defendants St. Paul and QAD, participate in the mediation before Wulff scheduled for March 12, 2004. (*See* RJN Exh. D at ¶¶ 1-3.) Wulff's fee for the mediation was ordered paid in equal parts by St. Paul and QAD. (*Id.* at ¶ 7.) The Order further provided that:

> Each **party shall be prepared to sign an agreement** with the mediator at the mediation . . . such as the mediator may desire, **which protects the mediator from personal liability**, defines his role, and protects communications made to him from compelled disclosure, as is customary. . . . The parties shall abide by the usual, ordinary and customary confidentiality rules governing mediations . . .

[4] *See also* RJN Exh. D (March 4, 2004 Stipulation and Order Regarding Mediation).

(*Id.* at ¶ 4 (emphasis added).) California Evidence Code sections 1115 through 1128 were incorporated by reference into the Order, and made explicitly applicable to the mediation. (*Id.* at ¶ 5.) California Evidence Code section 1119, pertaining to confidentiality requirements for mediation, was set forth in the Order in full. (*Id.*)

On March 12, 2004, as ordered, the mediation was held before Wulff. (Complaint at ¶¶ 121-138; FAC at ¶ 41.) Subramanian (appearing *in pro per*) and Vedatech, Inc. (represented by counsel) participated in the mediation. (Complaint at ¶¶ 124-129; FAC at ¶ 52.)[5] Subramanian and Vedatech reviewed copies of Wulff's standard form of Confidentiality Agreement and the Mediation Procedures document clearly explaining the limitations on Wulff's conflicts check and disclosure. (FAC at ¶ 52.)[6] Subramanian insisted that he would only sign a version of the Confidentiality Agreement containing his edits. (*Id.*) Wulff reviewed Subramanian's modified bilateral draft with Plaintiffs and discussed the document's provisions. (FAC at ¶¶ 52, 53.) Subramanian and two attorneys for Vedatech signed the modified Agreement. (FAC at ¶ 56; Exh. 1, Ingersoll Decl. at p. 2.) Despite these allegations underlying the Vedatech lawsuit, Subramanian now claims that Wulff "exerted duress" and "misrepresent[ed] the extent of disclosure regarding his prior contacts with counsel," and "**forced** the Vedatech parties to sign a document . . . ." (Complaint at ¶¶ 126-127 (emphasis added).)

The Confidentiality Agreement provided that "all parties agree that the mediator . . . ha[s] no liability for any act or omission in connection with the mediation." (Exh. 1, Ingersoll Decl. at p. 1.) Subramanian read the Confidentiality Agreement before agreeing to be bound by its terms, even making a change at an unrelated point in the quoted sentence. (*Id.*)

Subramanian and Vedatech's counsel left the mediation at 4:00 p.m. (Complaint at ¶ 129; FAC at ¶ 57.) The other parties remained. St. Paul and QAD reached a settlement resolving QAD's claims against Vedatech (St. Paul's insured) and Subramanian. (Complaint at ¶¶ 138-144; FAC, at Exh. A, p. 3, ¶¶ 1, 3.) The settlement agreement was drafted explicitly so as not to

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[5] *See also* "Confidentiality Agreement," signed by Subramanian and Vedatech's counsel, Declaration of Andrew W. Ingersoll in Support of Motions to Dismiss, for Summary Judgment and/or to Strike Complaint, filed herewith ("Ingersoll Decl."), Exh. 1 at p. 2.

[6] *See also* Exh. 2, Ingersoll Decl.

impair either Vedatech's or Subramanian's right to pursue any affirmative claims against QAD or Vedatech's coverage claims against its insurer St. Paul. (FAC, at Exh. A, p. 5, ¶¶ 8, 9.)

Unhappy with the settlement, the Vedatech plaintiffs filed the Vedatech lawsuit against QAD and St. Paul. After defendants moved to dismiss, but before any ruling by the Court, the Vedatech plaintiffs filed the FAC adding Wulff as a defendant. The FAC alleged, *inter alia*, fraud, constructive fraud, negligent misrepresentation, conspiracy and unfair competition.

C. Post-Mediation Allegations.

The remainder of Subramanian's allegations involving Wulff stem entirely from positions Wulff's attorneys took while defending Wulff against the claims in the Vedatech lawsuit. These allegations claim that Wulff's attorneys:

1. filed allegedly false declarations with the court (although Plaintiff admits that he has already [unsuccessfully] argued this point to the Court in the Vedatech lawsuit) (Complaint at ¶¶ 147-48);
2. argued that Subramanian should be sanctioned (*id.* at ¶ 151);
3. maintained these positions on appeal (*id.* at ¶ 154); and
4. made alleged misrepresentations to "corruptly influence the court" in written briefs and oral arguments on appeal by, for instance, "denigrating SUBRAMANIAN'S status as a *pro se* litigant . . . in a derogatory and corrupt way." (*Id.* at ¶ 165; *see also* ¶ 166.)[7]

[7] In fact, the argument was entirely benign. Counsel for Wulff stated, for instance, "This is not a situation in reality of a pro se defendant who is any pro se defendant. If you look at the excerpt of record, page one and following, you will see that he has always employed many lawyers, major law firms on occasion, international law firms on occasion. He has always had at least one attorney at his side and at least two attorneys throughout the litigation in Federal Court here. If you look at the record, the supplemental excerpts of record at Exhibit S, you will see the manner in which he refers to himself. His e-mail address is prosedefendant@Yahoo.com. We – we submit that this is a reflection of the fact that this has become something of an avocation for him and something that is inappropriate at every level." (Certified Reporter's Transcript of Audiotape of Oral Argument of May 16, 2007, attached as Exh. 3 to Ingersoll Decl., at 21:16-22:7.) The entirety of counsel's arguments can be found at 20:23-23:12. The exhibit counsel presented to the appellate panel summarizing the litigation chronology of the four cases, and the multiplication of proceedings up to that point, is also attached as Exh. 4 to the Ingersoll Decl.

Subramanian further alleges that "the actions taken by WULFF after the 'mediation' were not in any capacity as a mediator but simply ***as a civil litigant***, so that to the extent the Court may find any immunity for Wulff for activities regarding any 'mediation,' they do not apply to the facts alleged herein regarding obstruction of justice etc., and WULFF may not escape liability by means of claiming immunity." (*Id.* at ¶ 173 (emphasis added).)

D. This Court's Ruling In The Vedatech Lawsuit.

This Court dismissed all of the claims against Wulff in the Vedatech lawsuit on the ground that California law on quasi-judicial immunity precluded tort claims against Wulff. The Court imposed $15,000 in Rule 11 sanctions against Subramanian, personally, for a frivolous Rule 11 motion brought against Wulff, and $5,000 against Vedatech's counsel. In addition, the Court conducted a thorough analysis of the pleadings as to Wulff and awarded Wulff $22,584 in costs and fees for having to defend against the unreasonable and vexatious proceedings filed by the Vedatech plaintiffs. (Dismissal Order at 32:26-36:6.) The Court wrote that: "[it] agrees that Vedatech and Subramanian, recklessly and in bad faith, multiplied the legal proceedings against Wulff by recklessly raising frivolous arguments regarding the inapplicability of [*Howard*, 222 Cal. App. 3d at 847]." (*Id.* at 33:17-20.) The Court found that the arguments raised by the Vedatech plaintiffs were "substantively indefensible" and evidenced "a fundamental ignorance (either intentional or reckless) of the ability to read case law." (*Id.* at 33:24 and 34:11-13.) The Court explicitly warned Subramanian that more extensive sanctions would be imposed if he failed to cease: "Subramanian is admonished, however, that the court will not hesitate to impose much harsher Rule 11 sanctions should he continue to engage in the conduct described in this order." (*Id.* at 23:26-24:1.) So egregious were the Vedatech plaintiffs' filings in that litigation that the Court found "the only way to deter Subramanian" was to impose sanctions of $1,000 per page for any future frivolous filings, including any "new frivolous cause of action." (*Id.* at 24:1-5.) The ***238 paragraph, 54 page*** Complaint at issue followed.

The Ninth Circuit affirmed this Court in all respects.[8] On December 27, 2007, this Court entered judgment. (Case No. 04-01249, Dkt. No. 181.) Subramanian has paid none of the sanctions awarded, however. Instead he has moved to set aside the judgment (twice), has moved to alter or amend the judgment, and has filed this new lawsuit. On June 16, 2008, the Court ordered this case related to the Vedatech case (Case No. 04-01249, Dkt. No. 221), and on July 17, 2008 the Court entered an order denying Subramanian's first motion to set aside the judgment, ordering him to make payments by July 31 and conditionally granting motions brought by St. Paul and Wulff for an Order to Show Cause re Contempt for Subramanian's failure to pay and for a debtor's exam of Subramanian (Dkt. No. 231). In or about late July 2008 Subramanian filed further pleadings attacking that order.

IV. LEGAL ARGUMENT

The claims against Wulff in this lawsuit are barred by (1) *res judicata*, (2) California law on quasi-judicial immunity, (3) the California litigation privilege of Civil Code Section 47(b),[9] (4) the *Noerr-Pennington* doctrine, and (5) the California Anti-SLAPP procedure for striking improper pleadings.[10] Alternatively, and to preclude Subramanian from prolonging this saga by voluntarily dismissing the Complaint only to refile it later, Wulff asks the Court to enter summary judgment under Rule 56(f), taking all facts alleged in the Complaint to be true.

A. Subramanian's Claims Are Barred By *Res Judicata.*

The dismissal of all claims against Wulff in the Vedatech lawsuit bars all of Subramanian's claims here on grounds of *res judicata*. *Res judicata* "bars re-litigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits." *Tahoe Sierra Preservation*

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[8] RJN Exh. B (Order affirming District Court) and Exh. E (Decree of Judgment).

[9] In the Vedatech lawsuit, the District Court precluded claims against Wulff on grounds of absolute quasi-judicial immunity, and it did not rule on his claims of immunity based on Civil Code Section 47. (Dismissal Order, RJN Exh. A, at 29:15-18.) Nevertheless, the defense remains applicable here.

[10] Because the claims against Wulff are entirely barred, this brief does not substantively challenge the claims, but to the extent this Court deems such an analysis necessary, Wulff incorporates by reference the arguments contained in the remaining defendants' motions to dismiss.

Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1078 (9th Cir. 2003). "*Res judicata* is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Stratosphere Litig. LLC v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 n.3 (9th Cir. 2002) (*citing Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001)). As discussed below, this lawsuit meets all three elements of the test.

The rationale behind the doctrine is particularly apt here:

> The doctrine of res judicata provides that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." **The application of this doctrine is "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction**." Moreover, a rule precluding parties from the contestation of matters already fully and fairly litigated "conserves judicial resources" and "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

In re Schimmels, 127 F.3d 875, 881 (9th Cir. 1997) (emphasis added) (*quoting Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

The burden on private parties faced with duplicative litigation is also an important consideration. As the Ninth Circuit has stated: "The private values protected include shielding litigants from the burden of re-litigating identical issues with the same party, and vindicating private parties' interest in repose." *Clements v. Airport Auth.*, 69 F.3d 321, 330 (9th Cir. 1995). Here, the nature of the claims against Wulff in both lawsuits – reckless in the first lawsuit, repeated in this second suit[11] – impose significant hardship on him and represent the worst kind of waste of judicial resources, which the rule was intended to prevent.

In considering the first element for proving *res judicata*, it is manifest that there is an identity of claims. "Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992). The two suits must

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[11] This is actually the *sixth* lawsuit related to the Vedatech-QAD relationship (*see, e.g.*, February 21, 2007 order in Case No. 06-3050 ("This case stems from *four* prior cases . . .")). In that Order, the Court dismissed Subramanian's claims (against many of the same parties to this case) on *res judicata* grounds because, as here, they involved claims that "were litigated or could have been litigated" in his prior actions. (Order at 18.) The Court also awarded $47,000 in sanctions against Subramanian for the "frivolous" arguments dismissed therein. (*Id.* at 22.)

arise from "the same transactional nucleus of facts." *Owens*, 244 F.3d at 714. As detailed in Sections III.A-C above, there can be no question that this lawsuit complains of the exact same "transactional nucleus" as in the Vedatech lawsuit: Wulff's mediation of the earlier dispute.

Subramanian has asserted "causes of action" against Wulff to "Set Aside the Order and Judgment,"[12] for a civil "RICO" violation, for fraud and for "Violation of Civil and Constitutional Rights."[13] While some of these claims were not asserted in the Vedatech lawsuit, this does not justify the present action because *res judicata* precludes "claim splitting." *See, e.g., Davis v. Sun Oil Co.*, 148 F.3d 606, 613 (6th Cir. 1998) (per curiam) (referring to the doctrine against claim-splitting as "the 'other action pending' facet of the *res judicata* doctrine"). Because the claims in this Complaint stem from the 2004 mediation that was the subject of the Vedatech lawsuit, Subramanian has impermissibly split causes of action. *See, e.g., Adams v. California Dept. of Health Services*, 487 F.3d 684, 689-90 (9th Cir. 2007).

As to the second element, it is indisputable that there has been a final judgment on the merits in the Vedatech lawsuit. This Court dismissed all of the claims against Wulff with prejudice, finding them barred by California's doctrine of quasi-judicial immunity, and entered judgment. (*See* Dismissal Order at 25:17-29:20.) Dismissal for failure to state a claim under FRCP 12(b)(6) is a "final judgment on the merits" for purposes of *res judicata*. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981). The Vedatech plaintiffs unsuccessfully appealed the dismissal and this Court entered judgment on all claims against Wulff (leaving open only one state court claim against another defendant) on December 27, 2007. (Case No. 04-1429, Dkt. No. 181.)

Despite the Ninth Circuit's ruling – upholding the District Court's opinion in all respects – Subramanian "disputes that WULFF is eligible for immunity for any federal cause of action, and to the extent plaintiff can get relief from the judgment granting immunity for state law causes of

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[12] This is not a valid claim, but an improper collateral attack on a valid judgment. The claim was recast by Subramanian in a motion (Case No. 04-1249, Dkt. 202), that this Court has since denied. Consequently, the claim need not be further addressed in this Motion.

[13] Although immaterial to resolution of this Motion, it is not clear whether Subramanian includes Wulff among the class of defendants to his claim under the Unfair Competition statute.

action, disputes immunity for WULFF for any state cause of action also." (Complaint at ¶ 172.) Subramanian is a sophisticated *pro se* litigant who has filed numerous appeals and at least one writ of certiorari with the United States Supreme Court in an earlier related case involving QAD. (*See* CV-04-01806-PJH and related appeal No. 04-16416, at Dkt. No. 26.) Subramanian understands the purposes of appeals and the effects of losing on appeal – thus, his efforts to base this complaint on already-denied challenges to this legal ruling suggests that the true purpose and effect in bringing this lawsuit is to harass Wulff.

The third element, privity between parties, is satisfied here as well. For purposes of *res judicata*, privity exists when a party is "so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." *Stratosphere Litig. LLC*, 298 F.3d at 1143. Here, Subramanian was a plaintiff in the Vedatech lawsuit, and Wulff and many of the other named defendants were parties to that suit as well. It is no defense that Subramanian has added additional defendants, as the claims are identical. *See Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 966 (3d Cir. 1991) ("*res judicata* may be invoked against a plaintiff who has previously asserted essentially the same claim against different defendants where there is a close or significant relationship between successive defendants").

B. Subramanian's Claims Against Wulff Are Barred By California Law On Absolute Quasi-Judicial Immunity, By The Litigation Privilege Of Civil Code Section 47(b) And By The *Noerr-Pennington* Doctrine.

Subramanian's claims against Wulff here are barred by California law or by the federal *Noerr-Pennington* doctrine. The Ninth Circuit has upheld the dismissal of the state law claims and nothing has changed to warrant a different result here.

1. The Doctrine Of Absolute Quasi-Judicial Immunity Precludes Subramanian's Claims Against Wulff.

As a court-appointed mediator, Wulff performed quasi-judicial functions and is absolutely protected from civil liability under both (1) the California common law doctrine of quasi-judicial immunity and (2) the statutory "litigation" privilege of California Civil Code section 47(b). *Howard*, 222 Cal. App. 3d at 864 ("The absolute immunity and [statutory] privilege . . . must protect [the mediator] from suit. If such protection is to be meaningful it must be effective to

prevent suits such as this one from going beyond demurrer."). The *Howard* holding is controlling California authority mandating that all claims against Wulff be dismissed.

This Court's ruling dismissing the claims in the Vedatech lawsuit is clear:

> Quite appropriately, Wulff cites *Howard* in support of his motion to dismiss all claims against him in this case.
>
> . . .
>
> Under *Howard*, Wulff is immune from all claims asserted against him in the FAC.

(Dismissal Order at 27:27-28 and 29:13-14.)[14]

Howard v. Drapkin applies here. In the Vedatech lawsuit, Subramanian admitted that he was ordered by Judge Komar to mediation before Wulff. (*See* Excerpt of Transcript of September 16, 2004 Hearing ("Transcript"), Ingersoll Decl., Exh. 5 at 38:12-19.) He also conceded: "*Howard v. Drapkin* does not necessitate that the mediator be a court-appointed mediator in order to qualify under its reasoning for absolute immunity." (*Id.* at 54:25-55:2.) As the Court noted, Subramanian's arguments to the contrary in the Vedatech lawsuit displayed "a fundamental ignorance (either intentional or reckless) of the ability to read case law." (Dismissal Order, RJN Exh. A, at 34:11-13.) The continued assertion of claims in this latest lawsuit, after a failed appeal and the imposition of sanctions, crosses the line to gross recklessness. As before, any claims against Wulff ultimately derive from his role and conduct as a court-appointed mediator and should therefore be dismissed with prejudice.

2. The Litigation Privilege Of California Civil Code Section 47 Precludes Subramanian's State Law Claims Against Wulff.

In addition to quasi-judicial immunity, the California Civil Code bars Subramanian's state law claims against Wulff based on communications connected to or made in the course of his conduct as a mediator,[15] as well as that of his attorneys in the Vedatech lawsuit. *See* Cal. Civ.

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[14] *See also* Order of the Court of Appeals, RJN Exh. B, at p. 8 ("A mediator, such as Randall Wulff, "fulfilling a quasi-judicial function intimately related to the judicial process" qualifies for such immunity. [Howard] at 854.").

[15] Although the litigation privilege of Section 47(b) may not be applicable to some claims based on federal statutes, Mr. Wulff's quasi-judicial immunity under *Howard* unquestionably applies to all of Subramanian's claims. *See Kimes v. Stone*, 84 F.3d 1121, 1127 (9th Cir. 1996) (disallowing

Code § 47(b); *see also Kashian v. Harriman*, 98 Cal. App. 4th 892, 912 (2002) ("Civil Code section 47, subdivision (b) defines what is commonly known as the '[L]itigation [P]rivilege.'"). The Litigation Privilege applies to communications: "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). Further, the privilege applies "to any communication . . . and all torts except malicious prosecution" and to communications "outside the courtroom and [where] no function of the court or its officers is involved." *Id.* (citations omitted).

The allegations against Wulff in this lawsuit are but a different version of those contained in the Vedatech lawsuit and, as in that lawsuit, fall squarely within those protected by Section 47(b). All of them – including those that also violate the Anti-SLAPP procedure (see below) – are connected to Wulff's efforts to conduct the court-ordered mediation. For instance, Subramanian describes the process at the outset of the mediation (Complaint at ¶¶ 122-25), alleges that the conflicts check and disclosures were inadequate (Complaint at ¶ 126; *compare* FAC at ¶¶ 48, 51-53, 55), alleges that the mediation allowed St. Paul and QAD to conduct their fraud in secrecy (Complaint at ¶¶ 130, 135-36; *compare* FAC at ¶¶ 42, 48, 52-53, 55), and complains about continuation of the mediation as between St. Paul and QAD after Plaintiffs left (Complaint at ¶¶ 134-44; *compare* FAC at ¶¶ 57-59).

Subramanian's additional allegations involving the acts of Wulff's attorneys in the Vedatech lawsuit are similarly protected. (Complaint at ¶¶ 147-151, 154-57, 165-66.) This is true even where the alleged communications could be in furtherance of allegedly fraudulent aims:

> [C]ommunications made in connection with litigation do not necessarily fall outside the privilege simply because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal. This is assuming, of course, that the communications are "logically related" to the litigation. **The communications in this case were not only related to the litigation, they were the litigation, or more accurately the pleadings in the litigation.**

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the state law Section 47 defense for private actors in the context of claims arising under 42 U.S.C. § 1983 but affirming dismissal of all claims against state court judge, citing *Ashelman v. Pope* 793 F.2d 1072 (9th Cir. 1986) (en banc)).

Kashian, 98 Cal. App. 4th at 920 (dismissing California Unfair Competition claims, among others) (emphasis added); *see also Rothman v. Jackson*, 49 Cal. App. 4th 1134, 1145 (1996) ("[A] communication is privileged under section 47(b) if made in, or in anticipation of, litigation by litigants or other authorized participants to achieve the objects of the litigation, and if the communication has some connection or logical relation to the action.") (citing, among others, *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990)). Here, much as in *Kashian*, Subramanian's only new allegations are that the filings and oral statements made by Wulff's attorneys trigger liability. But, as in *Kashian*, the Litigation Privilege compels dismissal of these vexatious claims.

3. The *Noerr-Pennington* Doctrine Separately Supports Dismissal Of All Claims Asserted Against Wulff.

The federal common law *Noerr-Pennington* doctrine separately supports dismissal of all of Subramanian's claims against Wulff, including those based on federal law. Under this doctrine, "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). Such protected conduct includes litigation activity. *See, e.g.*, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972). Here, because the acts underlying Subramanian's claims against Wulff all stem from or involve the participation of Wulff or his attorneys in ongoing litigation, the federal common law *Noerr-Pennington* doctrine separately supports dismissal of those claims with prejudice. *See, e.g.*, *Sosa*, 437 F.3d at 942 (dismissing RICO claim based on pre-litigation demand letter); *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000) (affirming dismissal of claims under 42 U.S.C. § 1983); and *Meridian Project Systems, Inc. v. Hardin Const. Co., LLC*, 404 F. Supp. 2d 1214 (E.D. Cal. 2005) (dismissing state law claims including a claim under California's unfair competition statute). That some of the communications underlying Subramanian's claims arose in the context of a mediation, as opposed to in court, changes nothing. *See Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528-29 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993) (petitions directly to court and communications "incidental to the prosecution of the suit," such as those involving settlement communications, are protected by the

doctrine). Plainly, *Noerr-Pennington* provides a separate ground compelling dismissal of Subramanian's ill-conceived claims against Wulff.

C. In The Alternative, Summary Judgment Should Be Granted On The Claims Against Wulff.

As an alternative ground for disposing of this unmeritorious lawsuit, and without prejudice to the motion to dismiss or motion to strike, Wulff seeks an order granting summary judgment in his favor pursuant to FRCP Rules 12(b) and 56. For purposes of this Motion, Wulff accepts as true every allegation in the new Complaint. Subramanian's claims are barred by mediator immunity under California common law. Subramanian has categorically admitted that Judge Komar ordered the Vedatech plaintiffs to mediation before Wulff (Transcript at 38:12-19). Moreover, as Subramanian also concedes, "*Howard v. Drapkin* does not necessitate that the mediator be a court-appointed mediator in order to qualify under its reasoning for absolute immunity." (Transcript at 54:25-55:2.) Immunity applies regardless of any imagined distinction as to whether the mediator in a court-ordered mediation is properly considered "court-appointed."

This Court's ruling should preclude any possibility that Subramanian, who has filed nearly a dozen separate actions in this Court (when considering the multiple removal petitions) related to the underlying controversy, is able to reassert claims against Wulff. Anything less would frustrate the purpose behind mediator immunity which, as *Howard* explained, is to discourage "inappropriate collateral attacks" and to insulate mediators "from vexatious actions prosecuted by disgruntled litigants." *Howard*, 222 Cal. App. 3d at 852 (citations omitted). Indeed, "if such protection is to be meaningful it must be effective to prevent suits such as this one from going beyond demurrer." *Id.* at 905.

Under Rule 41(a), this motion for summary judgment means that Subramanian cannot avoid resolution in this Court by preemptively withdrawing his Complaint. FRCP Rule 41(a)(1)(i). Any dismissal can now only be by stipulation or court order. Either way, in order to achieve the purposes articulated by *Howard,* it is imperative that dismissal be with prejudice and without leave to amend.

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In order to ensure that Subramanian's harassing and vexatious litigation is put to a final end, the Court should either (1) dismiss this action with prejudice and without leave to amend under Rule 12(b)(6), or (2) grant Wulff summary judgment under Rule 56.

D. Subramanian's State Law Claims Should Be Stricken Under California's Anti-SLAPP Law.

Because Subramanian's claims arise out of the conduct of Wulff as a mediator or the conduct of his attorneys in the Vedatech lawsuit, his state law claims should be stricken under California Anti-SLAPP procedure. CCP § 425.16.[16] "SLAPP" is an acronym for "strategic lawsuit against public participation." *Decker v. U.D. Registry, Inc.*, 105 Cal. App. 4th 1382, 1385 (2003). The Anti-SLAPP protection applies where "but for . . . actions taken in connection with [earlier] litigation, [the plaintiff's] present claims would have no basis." *Navellier v. Sletten*, 29 Cal. 4th 82, 90 (2002). Under the statute, "a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike . . ." CCP § 425.16(b). In this diversity action, the District Court applies the California Anti-SLAPP procedures. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) ("[CCP § 425.16] and Rules 8, 12, and 56 can exist side by side each controlling its own intended sphere of coverage without conflict . . . The Anti-SLAPP statute, moreover, is crafted to serve an interest not directly addressed by the Federal Rules: the protection of the constitutional rights of freedom of speech and petition for redress of grievances.") (citations omitted).

[16] As with the immunity from Subramanian's state law claims provided by California Civil Code Section 47(b), Subramanian's federal claims may not be subject to California's Anti-SLAPP procedure. *Summit Media LLC v. City of Los Angeles*, 530 F. Supp. 2d 1084, 1094 (C.D. Cal. 2008) ("defendants sued in federal courts can bring anti-SLAPP motions to strike state law claims"). But the claims remains subject to dismissal under the *Noerr-Pennington* doctrine as discussed above. *See also United States. v. Hempfling*, 431 F. Supp. 2d 1069, 1084, n.8 (E.D. Cal. 2006) ("[T]he *Noerr-Pennington* doctrine is a cousin to modern anti-SLAPP statutes.").

1. The Actions Of Wulff And His Attorneys Are Protected Speech.

Resolving an Anti-SLAPP motion is a two-step process. First, the court must consider whether the defendant and moving party has made a threshold showing that the challenged causes of action arise from protected activity. *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 60 (2002). "The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).)" *Id.* at 67. The constitutional right to petition encompasses ***any litigation activity*** before a judicial body. *Navellier*, 29 Cal. 4th at 90. While cases subject to Anti-SLAPP proceedings typically involve allegations that a lawsuit was ***filed*** to squelch speech, litigation activity ***defending*** against a lawsuit – especially a sham lawsuit by the very same plaintiff– must be equally protected:

> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) **any written or oral statement or writing made in connection with an issue under consideration or review by a** legislative, executive, or **judicial body**, or any other official proceeding authorized by law.

CCP § 425.16(e) (emphasis added); *see also Kashian*, 98 Cal. App. 4th at 908 ("statements made in connection with or in preparation of litigation are subject to section 425.16") (*citing Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115 (1999)); *and Jefferson v. Carey*, No. 98-3754, 1999 U.S. Dist. LEXIS 11470, at *4-5 (N.D. Cal. July 20, 1999) (declaration of attorney absolutely privileged under Section 47(b)(2)).[17]

As outlined in Section III above, Subramanian complains about actions taken, and statements made, by Wulff (during the underlying mediation) and by Wulff's attorneys (during the Vedatech lawsuit) that he feels should trigger liability. According to Subramanian, these

[17] *See also* Order, *Subramanian v. QAD et al.*, Case No. 06-3050, Dkt. No. 75, (Feb. 21, 2007). In that case, this Court dismissed Subramanian's claims against many of the same defendants here for those defendants' litigation activities. (Order at *9.) The Court also granted those defendants' motions to strike and for attorneys' fees. (*Id.* at *14.)

actions somehow prevented Wulff from being a "true 'neutral'" (*id.* at ¶ 201), and included Wulff's "help" in "arrang[ing] the 'mediation'" (*id.* at ¶ 213) and, with respect to the acts of Wulff's attorneys, constitute "fraud upon the court" (*id.* at ¶ 176), and consist of "false statements in . . . court filings" (*id.* at ¶ 183.1). Subramanian even goes so far as to allege that Wulff is potentially liable for his acts during the mediation and "his acts subsequent to the mediation." (*Id.* at ¶ 236.) Under Section 425.16 and the case law interpreting it, because the complained-of actions were so clearly "made in connection with an issue under consideration or review by a . . . a judicial body," the first step in the two-step Anti-SLAPP process is easily satisfied here.

2. Subramanian Cannot Establish A Probability That He Will Prevail.

Under the second step of the Anti-SLAPP procedure, where a prima facie showing of protected speech is shown, the burden shifts to the non-moving party. Here, because the statements of Wulff and his attorneys are protected, Subramanian must establish a "probability" that he will prevail on the claims he has asserted. *Equilon*, 29 Cal. 4th at 61. This he cannot do.

To meet his burden, Subramanian must produce competent evidence showing that he has "stated and substantiated a legally sufficient claim." *Briggs*, 19 Cal. 4th at 1123. "The motion to strike should be granted if, as a matter of law, the properly pleaded facts do not support a claim for relief." *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 809 (2002). As discussed above, Subramanian simply has no claim against Wulff, who is entitled to quasi-judicial immunity and protected from suit based on the Litigation Privilege in California law, and as already specifically found by this Court in its order dismissing the Vedatech lawsuit. Indeed, this Court found his claims against Wulff in the Vedatech lawsuit were so baseless as to warrant sanctions under 28 U.S.C. § 1927.[18] Subramanian can produce no evidence showing that his claims based on California law have merit and they should be stricken.

[18] The Court should also consider exercising its discretion in sanctioning Subramanian pursuant to its June 22, 2005 Order and 28 U.S.C. § 1927. As discussed above, this Court already sanctioned Subramanian for "frivolous" and "vexatious" conduct, and threatened further sanctions of $1,000 per page for any future frivolous filings. This Complaint, which simply repeats the losing arguments first brought in 2004, should qualify for imposition of such sanctions.

V. CONCLUSION

Whether through application of *res judicata,* absolute quasi-judicial immunity, the Litigation Privilege of California Civil Code Section 47(b), the *Noerr-Pennington* doctrine, or through California's Anti-SLAPP procedure, Subramanian's claims against Wulff in this latest Complaint are wholly barred. Because there is no possible grounds for maintaining an action against Wulff with respect to the mediation, the Court should order the claims dismissed with prejudice.

Dated: August 4, 2008

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